Filed 8/6/15 In re R.F. CA4/2

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

In re R.F., a Person Coming Under the Juvenile Court Law.	
RIVERSIDE COUNTY DEPARTMENT OF PUBLIC SOCIAL SERVICES, Plaintiff and Appellant, v. C.H. et al., Defendants and Respondents.	E062650 (Super.Ct.No. SWJ007650) O P I N I O N

APPEAL from the Superior Court of Riverside County. John M. Monterosso, Judge. Reversed.

Gregory P. Priamos, County Counsel, and Anna M. Marchand, Deputy County Counsel, for Plaintiff and Appellant.

Richard L. Knight, under appointment by the Court of Appeal, for Defendant and Respondent C.H.

Megan Turkat Schirn, under appointment by the Court of Appeal, for Defendant and Respondent Ro.F.

I. INTRODUCTION

Plaintiff and appellant, Riverside County Department of Public Social Services (DPSS), appeals from a dispositional order that reunification services be provided to defendants and respondents, Ro.F. (father) and C.H. (mother), as to their son, R.F. DPSS contends the juvenile court erred as a matter of law in failing to apply the statutory presumption that reunification services should be denied under Welfare and Institutions Code section 361.5, subdivision (b)(13)[1] and that the court abused its discretion in ordering reunification services for mother. We conclude the juvenile court erred in its interpretation of the statute, and we therefore reverse and remand for further proceedings.

II. FACTS AND PROCEDURAL BACKGROUND

On October 16, 2014, DPSS filed a dependency petition alleging that R.F. (born in January 2005) came within the provisions of section 300, subdivisions (b) (failure to protect) and (g) (no provision for support). The petition alleged that mother had an extensive and continuing history of drug abuse; father lacked appropriate housing; both parents had histories of prior sustained allegations of general neglect and failure to benefit from services; and both parents had criminal histories that included convictions

[1] All further statutory references are to the Welfare and Institutions Code unless otherwise indicated.

for child abuse or endangerment. The petition also alleged that father was unable or unwilling to provide support for R.F.

The detention report detailed the prior history of the family. In August 2007, a petition was filed under section 300, subdivision (b) as to R.F. and his three half siblings.[2] An investigation revealed drug activity in the home, and the children reported there was sometimes no food in the house. It was also reported that there was domestic violence in the home. The allegations were sustained, and the children were removed from the parents' custody. In February 2008, the children were returned to the parents, and the court ordered family maintenance services.

In January 2009, a petition was filed under section 387 due to the parents' continued drug use, and the children were detained from the parents. In March 2009, the court continued the children's dependency and terminated reunification services as to the parents. The court ordered a permanent plan of legal guardianship for the children. Mother's stepmother was appointed legal guardian, and the dependency was terminated.

In September 2010, the parents filed a petition requesting the court to rescind R.F.'s guardianship and to return him to their custody. In May 2011, the court denied the petition. In December 2011, mother's stepbrother and his wife filed a petition requesting the court to appoint them as successor guardians. The court granted the petition and awarded reasonable visitation to the parents.

---

[2] Ro.F is not the father of the half siblings.

In June 2012, a petition was filed under section 300 as to R.F. The legal guardianship was terminated. On June 19, 2012, a JV-180 hearing was held, the dependency was reinstated, and mother was offered reunification services with authorization for family maintenance. Services were denied to father. In December 2012, R.F. was placed in the care of mother. In March 2013, dependency was terminated.

In July 2014, DPSS received a referral alleging general neglect. Mother was suspected of using methamphetamine again, and it was reported that people were in and out of the house all night, that mother frequented a casino at random times and left R.F., then age nine, home alone, and that mother slept all day.

The social worker made repeated home visits and left telephone messages for mother starting in July 2014; however, mother failed to return calls and missed a scheduled appointment. The social worker made an unannounced home visit on October 6, 2014. Mother denied trying to avoid the social worker. The home was adequately furnished and free from visible safety hazards, there was adequate food, and all utilities were working. Mother denied that R.F. had been left alone or that other people were living in the home. She admitted she went to the casino when R.F. was in school, but she was always back when he got home. She denied current drug or alcohol use and reported that she had completed treatment programs in the past and was using a faith-based program to help her with sobriety. She reported she was receiving treatment and

medication for anxiety, depression, and panic attacks. She was living on money she received from an inheritance, and she received food stamps and Medi-Cal for R.F.

The social worker spoke to R.F., who reported he always had enough food, and the utilities were always in working order. He denied any corporal discipline, sexual abuse, drug or alcohol use in the home, domestic violence, or criminal or police activity at the home. He reported that other people resided in the home. He denied he had ever been left alone, and if mother had to leave, he stayed with one of the other residents. In a further interview, mother denied that anyone else was living there, but during the interview, a woman came in through the back door, went into the refrigerator, and took out something to drink. The woman denied living there, but stated she visited often and spent the night.

Mother completed urine drug screening, and the results were positive for amphetamines and methamphetamine. Mother claimed she did not understand the positive results and asked if taking other medications could have caused them. She eventually admitted she had used methamphetamines as recently as the past weekend because she had been under a lot of stress. She admitted she used methamphetamine two or three times a week, but only when R.F. was at school, and never in the home.

Father denied knowing of mother's current drug use and denied knowing that R.F. was ever left alone. He denied any current drug use and reported he had completed a substance abuse program and attended an aftercare program. He was employed as an independent contractor in Arizona, and he visited R.F. at least twice a month. He

currently lived rent free in a room with two other men; the house was being remodeled and did not have running water, so he was not then in a position to care for R.F.

Mother had a 2007 misdemeanor conviction for child abuse/endangerment and had numerous Vehicle Code violations. Father had 2007 misdemeanor convictions for child abuse/endangerment, being under the influence of a controlled substance, and possession of a controlled substance or paraphernalia. He had a 2010 misdemeanor conviction for shoplifting and two 2011 convictions for driving under the influence.

At the detention hearing on October 17, 2014, the juvenile court found a prima facie case had been established under section 300, subdivisions (b) and (g). The court ordered R.F. detained and ordered visitation and services for the parents.

DPSS filed a jurisdictional/dispositional report in October 2014. R.F. had been placed with a nonrelated extended family member, V.S. Father reported that he expected to have a suitable place for R.F. to live with him by the end of November. He stated he had been drug free for almost two years, and he had been able to maintain his sobriety because he had moved to Arizona. Mother failed to maintain contact with the social worker and failed to keep a scheduled appointment.

R.F. was on track developmentally, and his grades were average. His teacher reported that he had no behavioral issues. He appeared saddened by the prospect of being removed from his mother again.

DPSS filed an addendum report in December 2014. R.F. had been removed from V.S.'s care and placed in foster care because V.S. had a criminal history. Father had

undergone hair follicle testing, and the results were positive for methamphetamine use. He told the social worker he did not understand how the results were positive, and he suggested that the low positive results could have been caused by over-the-counter medication. Mother had failed to maintain contact with DPSS, and her visitation with R.F. had been minimal.

DPSS recommended denial of reunification services to both parents under section 361.5, subdivision (b)(13) because they had extensive histories of chronic drug and alcohol abuse and had resisted or failed to comply with treatment offered in the past.

DPSS filed an amended petition in December 2014 striking the allegation under section 300, subdivision (g) and adding the following allegation: "The father has an extensive history and continues to abuse controlled substances, to include methamphetamines; thereby impacting his ability to appropriately care for, supervise, and protect the child, creating a detrimental home environment, and placing the child at risk of suffering serious physical harm."

The jurisdictional hearing took place in December 2014; neither parent appeared. Father's attorney represented that father had not contacted her since the November 6, 2014, detention hearing. The juvenile court found true the allegations of the petition under section 300, subdivision (b) and sustained the petition.

The juvenile court stated that both parents were "actively using" and that both had long-term chronic drug abuse problems. The juvenile court noted that father had had court-ordered treatment for drug abuse during the 2007 to 2009 dependency. However,

the juvenile court interpreted section 361.5, subdivision (b)(13) to mean that treatment for drug or alcohol abuse had been ordered within the three years prior to the filing of the petition, not that resistance to such treatment had occurred within that three-year period. Thus, the court found that father did not come within that statutory provision. The court found that reunification services would be in the best interest of R.F. and ordered that the parents participate in such services as set forth in the case plan. As to mother, the juvenile court stated: "I think I'm compelled to find it's in the child's best [interest] to grant her services and make that finding by clear and convincing evidence by virtue of the fact that she has been the custodial parent and did actually—is actually the more stable person in the child's life as opposed to the father. It just makes all the sense in the world that if father's getting this break, [R.F.] would want his mother to have a break. Both parents will receive reunification services."

III. DISCUSSION

DPSS contends the juvenile court erred as a matter of law in failing to apply the statutory presumption that reunification services should be denied under section 361.5, subdivision (b)(13) and that the court abused its discretion in ordering reunification services for mother.

A. *Standards of Review*

We review questions of statutory interpretation de novo. (*In re Corrine W.* (2009) 45 Cal.4th 522, 529.) We apply an abuse of discretion standard to review a juvenile court's determination that reunification services are in the best interest of the child (*In re*

G.L. (2014) 222 Cal.App.4th 1153, 1164-1165); however, a court abuses its discretion when it applies an incorrect legal standard to an issue before it (see, e.g., *In re R.T.* (2015) 232 Cal.App.4th 1284, 1301).

B. *Bypass Provision of Section 361.5, Subdivision (b)(13)*

Section 361.5, subdivision (a) emphasizes the legislative preference for maintaining family relationships through the provision of reunification services to parents unless a statutory exception applies. (*In re Elizabeth R.* (1995) 35 Cal.App.4th 1774, 1787.) Subdivision (b) lists situations, sometimes referred to as reunification bypass provisions (see, e.g., *J.A. v. Superior Court* (2013) 214 Cal.App.4th 279, 283), in which the Legislature has determined that reunification services are likely to be futile and therefore need not be offered to the parents (*In re Kenneth M.* (2004) 123 Cal.App.4th 16, 20; *In re William B.* (2008) 163 Cal.App.4th 1220, 1228).

Once the court finds by clear and convincing evidence that one of the bypass provisions applies, "'the general rule favoring reunification is replaced by a legislative assumption that offering services would be an unwise use of governmental resources.'" (*Renee J. v. Superior Court* (2001) 26 Cal.4th 735, 744, superseded by statute on another ground as stated in *In re Angelique C.* (2003) 113 Cal.App.4th 509, 518-519.) The parent then has the burden of establishing, by clear and convincing evidence, that reunification would be in the best interest of the child. (*In re William B.*, *supra*, 163 Cal.App.4th at p. 1227; § 361.5, subd. (c).)

At issue in the instant case is section 361.5, subdivision (b)(13), which provides, in pertinent part: "Reunification services need not be provided to a parent . . . when the court finds, by clear and convincing evidence, any of the following: [¶] . . . [¶] (13) That the parent or guardian of the child has a history of extensive, abusive, and chronic use of drugs or alcohol and has resisted prior court-ordered treatment for this problem during a three-year period immediately prior to the filing of the petition that brought that child to the court's attention, or has failed or refused to comply with a program of drug or alcohol treatment described in the case plan required by Section 358.1 on at least two prior occasions, even though the programs identified were available and accessible."

C. *Juvenile Court's Interpretation of Bypass Provision*

Father contends the juvenile court did not abuse its discretion in ordering that he be provided with reunification services. However, the juvenile court apparently misinterpreted section 361.5, subdivision (b)(13) as applying only when a parent has resisted services that were ordered within the prior three years. Rather, that bypass provision applies when, *within the three years before the filing of the petition*, the parent has resisted *prior* court-ordered services. (*Laura B. v. Superior Court* (1998) 68 Cal.App.4th 776, 779-780.)

Father next argues that even if the juvenile court applied the wrong standard, the evidence was insufficient to establish that he had resisted services. He had had no drug-related convictions since 2007, a driving under the influence conviction in 2011, and no convictions since then. Father told the social worker he had been drug free for almost

two years. His hair follicle test showed a low percentage rate. He apparently concedes on appeal that he used methamphetamine on a single occasion over Labor Day when he visited Hemet. He argues, however, that the "single low level positive hair follicle test does not establish clear and convincing evidence of resistance to treatment which distinguishes a brief or simple relapse from a resumption of regular drug use."

Although a brief relapse does not necessarily prove resistance (*Laura B. v. Superior Court*, *supra*, 68 Cal.App.4th at pp. 780-781), we cannot say as a matter of law that the evidence was insufficient to establish that father was resistant to treatment.

Father focuses solely on the recent hair follicle test, but the evidence indicates other drug abuse during the three years prior to the filing of the current petition. In an interview with the social worker on October 28, 2014, father stated he and mother had separated "about two years ago." He further stated he had started using methamphetamine "in 1993 and continued until 2011, around the time he and [mother] separated." He said he and mother "relapsed again about three years ago and he attended an aftercare program to help with his sobriety," and "during the time of the relapse, [mother] filed a JV-180 to reinstate services for [R.F.]" Although the record is not completely clear as to when mother filed her petition, the record indicates that "[o]n June 19, 2013 a JV-180 Hearing was held, dependency was reinstated and [mother] was offered reunification services, with authorization for Family Maintenance. Services were denied to [father]." Finally, father reported having been drug free for "almost two years."

The evidence set forth above could support a finding of resistance to treatment within the last three years. In *Randi R. v. Superior Court* (1998) 64 Cal.App.4th 67, 73, the court explained that resistance to treatment within the meaning of section 361.5, subdivision (13) is not narrowly defined to refer only to direct opposition, but that a failure to establish long-term sobriety may be considered resistance to treatment.

We conclude that the issue of whether father had resisted treatment within the meaning of section 361.5, subdivision (b)(13) was a question of fact for the juvenile court to address on remand.

D. *Best Interests of the Child*

Mother concedes that the provision for bypass of reunification services under section 361.5, subdivision (b)(13) applied to her. She thus bore the burden to prove by clear and convincing evidence that reunification was in R.F.'s best interest. (*In re S.B.* (2013) 222 Cal.App.4th 612, 624 [Fourth Dist., Div. Two]; *In re Lana S.* (2012) 207 Cal.App.4th 94, 109.)

In determining whether reunification would be in the child's best interest, the juvenile court may consider the parent's current efforts, fitness, and history; the gravity of the problem that led to the dependency; the strength of the bonds between the parent and child and between the child and his or her caretakers; and the child's need for stability and continuity. (*In re G.L.*, *supra*, 222 Cal.App.4th at p. 1164.) The court may also consider whether the parent failed to respond to previous services. (*In re Lana S.*, *supra*, 207 Cal.App.4th at p. 109.)

Here, R.F. was almost 10 years old when the jurisdictional/dispositional hearing was held in December 2014, and he had spent about five years out of mother's custody during previous dependencies. Mother did not appear at the jurisdictional/dispositional hearing, and had not contacted her attorney. She had also failed to contact DPSS to arrange visits with R.F. At the hearing on October 17, 2014, the juvenile court authorized twice weekly visitations, but as of October 31, mother had not attended any visits with R.F., although she had maintained frequent telephone communication with him. As of December 4, mother had maintained minimal visitation with the child—she had visited him during sporting activities and had had dinner with him once at his previous placement. Telephone calls had been minimal.

At the jurisdictional/dispositional hearing, R.F.'s attorney joined in DPSS's recommendation to deny services to both parents. She argued that he had been on a "'merry-go-round'" in which he had been able to be with a parent and then had been removed again because of the parents' substance abuse issues. She then argued that if the court determined that father should receive services, they should also be offered to mother because she was the parent who had successfully reunited in the past and had had a previous sustained period of sobriety.

"The best interests of the child are not served by merely postponing his chance for stability and continuity and subjecting him to another failed placement with the parent." (*In re William B., supra,* 163 Cal.App.4th at p. 1229.) The juvenile court stated it granted reunification services to mother primarily because mother had been the custodial parent,

and the court had ordered such services for father. The court's remarks indicate it would not have ordered services for mother if it had not done so for father. Thus, because reversal is required as to father, as discussed above, we conclude it is likewise required as to mother. On remand, the court should consider whether reunification services are appropriate for mother under the factors set forth in *In re G.L.*, *supra*, 222 Cal.App.4th at page 1164 and *In re Lana S.*, *supra*, 207 Cal.App.4th at page 109.

IV. DISPOSITION

The order appealed from is reversed and the matter is remanded for further proceedings consistent with this opinion.

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

KING
J.

We concur:

McKINSTER
Acting P. J.

MILLER
J.